INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 745

RAYONIER INCORPORATED, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Western District of Washington, Northern Division, rendered no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 53–65) is reported at 225 F. 2d 642.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 90). A timely filed petition for rehearing *en banc* was denied on October 14, 1955 (R. 91). On December 27, 1955, leave was granted to file a second petition

for rehearing (Supp. R. 1). On January 10, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including March 12, 1956. On February 17, 1956, the second petition for rehearing was denied (2nd Supp. R. 1). The petition for a writ of certiorari was filed on March 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Washington law, the alleged presence of combustible matter at the point of origin of the forest fire was the proximate cause of the damage.

2. Whether, under Washington law, the owner of the servient estate in a railroad right of way is under a duty to keep the right of way free of combustible matter.

3. Whether the Federal Tort Claims Act extends to a claim grounded upon the allegedly negligent failure of the Forest Service properly to fight and extinguish a forest fire originating on a railroad right of way and spreading to neighboring private and public lands.

STATUTE INVOLVED

The relevant provisions of the Federal Tort Claims Act[1] are as follows:

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[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921, *et seq.* While subsequently repealed,

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

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its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671–2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

STATEMENT

This action was brought by petitioner under the Tort Claims Act to recover damages for property loss allegedly sustained as a result of a forest fire which originated on a railroad right of way running across a national forest and which, thereafter, spread to neighboring public and private lands. Both courts below held that petitioner's amended complaint failed to state a claim upon which relief could be granted. The allegations of the complaint, and the proceedings below, may be summarized as follows:

1. *Allegations of fact in the amended complaint.* Petitioner is a Delaware corporation authorized to do business in the State of Washington (R. 3–4). Its principal business is the manufacture of pulp and, in connection therewith, it owns extensive timber lands in the State of Washington as well as sundry facilities and equipment for use in logging operations (R. 4–5). Additionally, at the times relevant to this action, it was a party to two so-called "Timber Sales Contracts" with the Forest Service of the Department of Agriculture, under the terms of which it had the right and obligation to purchase and cut certain timber on public lands (R. 5). On September 20, 1951, there remained uncut timber which petitioner had the right and obligation to purchase under these contracts (R. 5).

The Olympic National Forest contains extensive timber lands, many of which are adjacent to or in the general vicinity of lands owned by petitioner (R. 5–6). These public lands are administered by the Forest Service and a portion of the timber thereon is sold to private parties for commercial and industrial purposes (R. 6).

By agreement between the Forest Service and the State of Washington, a "Forest Service Protective Area" was established, embracing *inter alia* petitioner's lands and the above-mentioned public domain (R. 6). The Forest Service agreed to protect the land within this area against fire and to take action in suppressing fires originating on or threatening the area (R. 6–7). Petitioner and other adjacent landowners were aware of the establishment of the Forest Service Protective Area and of the duties of the Forest Service pertaining thereto (R. 7).

The District Ranger of the Forest Service for the district in which this Forest Service Protective Area was located was Sanford Floe (R. 8). In the performance of their duties, Floe and his subordinates were supposed to inspect and patrol the lands within the Protective Area to discover, abate, and eliminate conditions which constituted fire hazards (R. 9). Further, when a fire occurred, they were supposed to supervise, direct, and control its suppression (R. 9). Floe was authorized to employ, rent, and use all men, equipment, tools, and materials he deemed neces-

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sary to accomplish these ends (R. 9). Also, he and his subordinates were fire wardens of the State of Wahington and in such capacity had the authority to impress help in the prevention, suppression, and control of forest fires (R. 9–10).

It is further alleged that during 1951, and for several years prior thereto, the Port Angeles Western Railroad possessed a right of way across the public domain (R. 11). The locomotives and other equipment operated by the Railroad on the right of way were defective, with the result that they emitted sparks (R. 11). The Railroad had also permitted its right of way to become covered with inflammable matter and many of its track ties had rotted (R. 11–12). Additionally, such matter had accumulated on lands adjoining the right of way (R. 11–12). These conditions were, or should have been, known to Floe and could have been, but were not, abated by him prior to August 6, 1951 (R. 12). Floe had called to the Railroad's attention, however, its use of defective equipment and its failure to observe prescribed fire prevention practices (R. 12).

At approximately noon on August 6, 1951, sparks from a Port Angeles Western Railroad train crossing the public domain started fires on and in the vicinity of the right of way (R. 12). Shortly thereafter, Floe was notified of the fires, whereupon he and his subordinates immediately assumed exclusive supervision and control of the efforts to suppress them (R. 13). Petitioner

knew that this supervision had been undertaken and relied upon its being continued (R. 13–14).

Between August 7, and August 11, 1951, the fires spread over approximately 1,600 acres of land (R. 15). By the latter date, it was brought under control and thereafter remained contained within the 1,600 acre area until the morning of September 20, 1951 (R. 15). During this period, the fire and all burning material could have been completely extinguished had Floe employed available men and equipment (R. 25). On September 20, 1951, a northeasterly wind of not unusual force carried sparks and other burning matter from within the area to lands to the west and south (R. 24). New fires started and spread rapidly in various directions, destroying or damaging facilities and equipment on petitioner's property, as well as timber on the public domain which was covered by the Timber Sales Contracts entered into by petitioner and the Forest Service (R. 24, 31).

It is also alleged that the spread of the fire on September 20, as well as the resultant damage to petitioner's property, was attributable to the negligence of Floe and his subordinates in the conduct of their fire-fighting activities (R. 29). In broad outline, this negligence consisted of the failure at various stages to dispatch and utilize sufficient amounts of the men and equipment at their disposal; the failure to maintain proper fire patrols and look-outs; the failure to take appro-

priate action in the light of weather conditions and weather forecasts; the failure to discover and extinguish between August 11, 1951, and September 19, 1951, all fires and burning matter in the 1,600 acre area; and the failure to carry out a Fire Suppression Plan which previously had been adopted by the Supervisor of the Olympic National Forest (R. 13–19).

2. *Proceedings in the courts below.* On February 19, 1954, the amended complaint was filed (R. 3–35). On February 27, 1954, the United States made an oral motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter (R. 48–49). After a hearing (R. 48–65), the District Court granted the motion on the former ground and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 66–67).

The Court of Appeals affirmed. With respect to the alleged presence of combustibles on and along the right of way, the court held (1) that they were not the proximate cause of the damage complained of (Pet. App. 55–56), and (2) that, assuming the truth of petitioner's allegations, the Government was not guilty of actionable negligence (Pet. App. 60–65). With respect to the alleged negligence of the Forest Service in fighting the fire on the 1600 acre area, the court determined (1) that the Forest Service was acting in the capacity of a public fireman and (2) that,

as a consequence, the claim was barred by this Court's holding in *Dalehite* v. *United States*, 346 U. S. 15, 43–44 (Pet. App. 56–59).

ARGUMENT

By this action, petitioner seeks to impose liability upon the United States under the Tort Claims Act for the alleged damage to its property flowing from a fire which it concedes was set by an improperly operated locomotive on the Port Angeles Western Railroad's improperly maintained right of way across the national forest and which, as the complaint itself shows, was fought by the Forest Service in the capacity of a public fireman. Insofar as the claim is based upon the theory that the United States may be held responsible for the railroad's misconduct which occasioned the fire, the court below correctly determined that petitioner's claim fails on two independent local law grounds: (1) The events transpiring prior to the spread of the fire to the 1,600 acre area on August 11, 1951, were not the proximate cause of the damage to petitioner's land, and (2) the Government was under no duty to keep the right of way clear of combustibles or to guard against the railroad's negligence. To the extent that the action is based upon the alleged negligence of the Forest Service in fighting the fire on the 1,600 acre area, the court properly held that the claim was barred by this Court's decision in *Dalehite* v. *United*

States, 346 U. S. 15. Accordingly, there is no occasion for further review.

1. Petitioner strenuously contends (Pet. 13–15) that the court below erred in its construction of Washington law respecting the obligation of a landowner to maintain in good repair a railroad right of way running across his property. In addition, the petition seemingly takes issue (Pet. 13–14) with the court's determination that the railroad possessed a conventional easement with respect to the right of way.

While these assertions are without substance (see pp. 12–15), *infra*), even if such were not the case petitioner's position would hardly be improved. For the principal basis of the holding below that the allegations of pre-August 11 negligence failed to state a cause of action was that, reading the complaint in its entirety, this negligence was not the proximate cause of the damage. Pointing to the allegations (1) that between August 11 and September 20 (when it spread to petitioner's land) the fire was contained within the 1,600 acre area and (2) that, had the forest ranger Floe properly utilized the men, equipment, and water available for the purpose, the fire could have been completely extinguished during that period, the court observed (Pet. App. 55):

> While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as neg-

> ligence in failing to control the early spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1,600-acre plot is determinative of the liability of the Government, if any. The fire, after reaching the 1,600-acre tract, smouldered for more than a month, flared up again and reached appellant's property. In our opinion it was this recurrence of fire on the 1,600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the act or omissions of agencies of the Government prior to the containment of the fire in the 1,600-acre area had terminated.

This view accords with generally accepted principles of proximate causation, fully applicable in the State of Washington. As the Supreme Court of that jurisdiction has held on numerous occasions, the proximate cause of a particular loss or injury is that "cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces [the damage], and without which that [damage] would not have occurred." *Burr* v. *Clark,* 30 Wash. 2d 149, 157, 190 P. 2d 769, 773. See also *Scobba* v. *City of Seattle,* 31 Wash. 2d 685, 198 P. 2d 805; *Viking Automatic Sprinkler Co.* v. *Pacific Indemnity Co.,* 19 Wash. 2d 294, 142 P. 2d 394; *Pierce* v. *Pacific Mutual Life Ins. Co.,* 7 Wash. 2d 151, 109

P. 2d 322; *Eckerson* v. *Ford's Prairie School District No. 11,* 3 Wash. 2d 475, 101 P. 2d 345. Cf. Prosser on *Torts* (1941), pp. 311, *et seq.*

2. While deeming its determination on proximate cause to be dispositive of the Government's liability for the purported presence of combustible material on and alongside of the railroad right of way, the Court of Appeals nevertheless went on to consider whether, in any circumstances, such liability would exist. In answering this question in the negative (Pet. App. 60–65), the court again looked primarily to local tort law principles. We submit that these principles were correctly applied.

Petitioner to the contrary notwithstanding, railroads enjoy an easement in their rights of way on public lands. Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U. S. C. 934; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262; *Himonas* v. *Denver & R. G. W. R. Co.,* 179 F. 2d 171 (C. A. 10). And it is universally accepted that, absent a contract whereby it assumes the duty of so doing, the holder of the servient estate owes no common law obligation to make repairs, either to the dominant owner or to third parties. Instead, the duty to maintain the dominant estate and to insure that it remains in good condition devolves upon, and solely upon, the owner of the easement. See *e. g., Reed* v. *Allegheny County,* 330 Pa. 300, 303, 199 Atl. 187; *Herzog* v. *Grosso,* 41 Cal. 2d 219, 259 P. 2d 429;

Strauss v. *Thompson,* 175 Kan. 98, 259 P. 2d 145; *City of Bellevue* v. *Daly,* 14 Idaho 545, 549, 94 Pac. 1036; *Hastings* v. *Chi., R. I. & P. Ry. Co.,* 148 Iowa 390, 126 N. W. 786; *Herman* v. *Roberts,* 119 N. Y. 37, 23 N. E. 442; 2 *American Law of Property,* § 8.66; Jones on *Easements* (1898) § 831. Thus, while Washington courts have continuously imposed liability on railroads for fires which originate in combustibles on their right of way and then spread to adjoining lands, even where there was no negligence in equipping and operating the locomotive (see *e. g., Abrams* v. *Seattle & M. Ry. Co.,* 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Inc. Co.* v. *Northern Pacific Ry. Co.,* 46 Wash. 635, 91 Pac. 13; *Slaton* v. *C., M. & St. P. Ry. Co.,* 97 Wash. 441, 166 Pac. 644), there has never been a suggestion that the servient owner could be equally held responsible.

Petitioner urges, however, that the Government was under a special statutory duty to maintain the right of way in good condition. In this connection, it points to Sections 5807 and 5818 of the Revised Statutes of the State of Washington (R. C. W. §§ 76.04.370, 76.04.450). The former Section provides that land covered by inflammable debris shall constitute a fire hazard and requires the owner and the person responsible for the existence of the hazard to abate it. Section 5818 declares it unlawful for any person to do or commit any act which shall expose the forest or

timber of the Olympic Peninsula to the hazard of fire.

Since it is not alleged that the Government committed any act upon the right of way which contributed to the purported fire hazard thereon, Section 5818 is by its terms inapplicable. And, insofar as Section 5807 is concerned, petitioner cannot point to a single judicial decision, either in Washington or elsewhere, which has construed the term "owner" in a statute of this character as encompassing the holding of the servient estate in an easement. The reason for this lack of support for petitioner's contention is clear. If so interpreted, the Section would have the effect of imposing criminal responsibility[2] upon the servient owner for statutory violations by the dominant owner even though, unlike a landlord-lessor, the former ordinarily has no duties with respect to the easement except the negative one of not interfering with the latter's use. See *e. g. Bina* v. *Bina,* 213 Iowa 432, 239 N. W. 68; *Harman* v. *Roberts,* 119 N. Y. 37, 23 N. E. 442; *Moffett* v. *Berlin Water Co.,* 81 N. H. 79, 121 Atl. 22; Jones on *Easements* (1898), § 831.

Were Section 5807 to be construed as rendering the owner of the servient estate subject to criminal and civil liability for the presence of fire hazards on the right of way—because of its lim-

[2] The violation of certain sections of title 36 of the Washington Revised Statutes, including Section 5807, constitutes a misdemeanor. See Section 5821 (R. C. W. § 76.04.480).

ited ownership alone and irrespective of who in fact created the hazard—that statute still could not be invoked here. The United States has consented to be sued under the Tort Act only for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U. S. C. 1346 (b), *supra*, p. 3. Thus, as this Court held in *Dalehite* v. *United States*, 346 U. S. 15, 44–45, the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault.[3]

3. (a). The court below found that (Pet. App. 58), in fighting the fire on both public and private lands, the Forest Service was acting in the capac-

[3] With respect to petitioner's allegation that there was combustible matter on the lands adjoining the right of way (R. 11–12), there are several complete answers. In the first place, the complaint does not allege, and petitioner has never suggested, that this alleged fire hazard was created by Government employees. Thus, once again, petitioner seeks to impose absolute liability upon the United States. Secondly, while the Washington courts have not been confronted squarely with the precise question, the California courts recently reiterated the long standing principle that a landowner is under no duty, in the use of his property, to guard against negligence by a railroad in the operation of its trains on an adjoining right of way. See *Atlas Assurance Co. Ltd.* v. *State*, 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus* v. *Marin Realty Co.*, 94 Cal. App. 2d 733, 211 P. 2d 582, 583–584. We know of no holding in any jurisdiction to the contrary.

ity of a public fireman. This ruling has ample support both in Congressional enactments pertaining to the duties of the Service and in the allegations of petitioner's complaint.

By the Act of May 23, 1908, c. 192, 35 Stat. 259, 16 U. S. C. 553, the Forest Service was directed by Congress to aid in the enforcement of the laws of the states and territories with regard to the preventing and extinguishment of forest fires. Three years later, following a series of unprecedented forest fires which burned millions of acres in Minnesota, Idaho, Washington and Oregon, Congress decided to broaden the participation of the Service in fire fighting activities. By Section 2 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all the "timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U. S. C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private

forest lands.[4] This cooperation takes several forms.[5] The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latter's direction of organized fire prevention and control. It conducts nationwide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements assuming the function of undertaking the suppression of fires on *all* lands within a particular area, whether federally owned or not. As stated in petitioner's complaint itself (R. 6–7, 9–10), such an agreement was outstanding in the area involved here and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it is to be noted that in Washington, as in other jurisdictions, these wardens have among their duties the control and suppression of forest fires throughout the forest area of the state.

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[4] Annual Report of the Secretary of Agriculture (1951), p. 18.

[5] See *The Work of the U. S. Forest Service* (Department of Agriculture Information Bulletin No. 91 (1952)), pp. 12, 18; *The Budget of the United States for the fiscal year ending June 30, 1955*, p. 343.

See Rev. Code Wash. §§ 76.04.060, 76.04.070. In this capacity, they clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.

While the statistical data relating to Forest Service fire prevention and suppression activities, as above outlined, cannot tell the whole story, they do give a good picture of the present magnitude of those activities. During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.[6]

(b). That the Tort Claims Act does not extend to a claim grounded upon the alleged failure of public firemen properly to extinguish a fire started by a railroad on its own right-of-way is clear from this Court's decision in *Dalehite* v. *United States, supra.* There, it was alleged, and the District Court found, that the Coast Guard had negligently performed its general public duty to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City. In reversing the District Court's ultimate determination of liability, the Fifth Circuit held that this purported negligence was not actionable.

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[6] *Budget*, fn. 5, *supra*, pp. 338, 339, 343.

In re Texas City Disaster Litigation, 197 F. 2d 771, 780. This Court agreed (346 U. S. 43–44):

> As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.
>
> "' . . . the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres* v. *United States*, 340 U. S. 135, 142."

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, *if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.* This case, then, is much stronger than *Feres*. We pointed out only one state

> decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon,* 295 N. Y. 51 * * *. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease. [Emphasis added.]

The recent decision of the Court in *Indian Towing Co.* v. *United States,* 350 U. S. 61, did not disturb this holding.[7] On the contrary, the majority, in determining that a claim grounded upon alleged negligence in the maintenance of a navigational aid was within the purview of the Tort Act, found *Dalehite* to be distinguishable (350 U. S. at 69):

> The differences between this case and *Dalehite* need not be labored. The govern-

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[7] After the decision in *Indian Towing*, petitioner moved in the court below for leave to file a second petition for rehearing which squarely urged that *Indian Towing* had overruled the fire-fighting portion of the *Dalehite* opinion. The court below granted the motion "good cause therefor appearing," considered the new petition, and thereafter denied it.

> in; factors in *Dalehite* sufficiently emerge from the opinion in that case.

In an accompanying footnote, the majority observed that in *Dalehite* the Court had:

> disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability . . ." in the law of torts. 346 U. S. at 44.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[8] In the same footnote, the Court made passing reference to *Workman* v. *New York City*, 179 U. S. 552. It might be noted that the complaint in *Workman* was not grounded upon the failure to fight a fire with due care. Rather, the claim there was based on the allegedly negligent navigation of a fire boat on its way to a fire.

It might also be noted that Washington follows the general rule, referred to by the Court in *Dalehite*, "that an alleged failure or carelessness of public firemen does not create private actionable rights." See, *e. g.*, *Lynch* v. *City of North Yakima*, 37 Wash. 657, 80 Pac. 79; *Cunningham* v. *City of Seattle*, 40 Wash. 59, 82 Pac. 143; *Lawson* v. *City of Seattle*, 6 Wash. 184, 33 Pac. 347.

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